Supreme Court, U.S.
FILED
DEC 2 1992
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NO. 92-6281

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT P. HAGEN,

PETITIONER,

vs.

STATE OF UTAH,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF UTAH

SUPPLEMENTAL BRIEF FILED BY PETITIONER IN RESPONSE TO THE BRIEF OF AMICUS CURIAE UTE INDIAN TRIBE

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Petitioner, Robert P. Hagen, respectfully submits this supplemental brief in response to the brief of Amicus Curiae, Ute Indian Tribe.

1. In it's brief, the Ute Indian Tribe couched the question presented in terms of whether the State of Utah should be prevented from relitigating the issue of whether the Uintah and Ouray Indian Reservation had been disestablished. Rule 14.1.(a), of the Rules of the Supreme Court of the United States, states that "only the question set forth in the petition or fairly included therein will be

considered by the court." The question presented in the petition was whether the reservation had been diminished by acts of congress. The rule does not appear to allow different issues to be raised. The Ute Indian Tribe argues that the Supreme Court of the State of Utah should have reached a different decision in State v. Perank , 191 Utah Adv. Rep. 5 (1992) based on the doctrine of collateral estoppel, comity and finality. Regardless of the opinion held by the Ute Indian Tribe of the Perank decision, the decision has been made and is controlling in petitioner's case. Rule 10 of the Rules of the Court does not address how the conflict arose or the order in which the opinions of the courts were filed. This court should accept certiorari because of the conflicting opinions of the Tenth Circuit Court of Appeals and the Supreme Court of the State of Utah.

2. In its brief, the Ute Indian Tribe argues that this court should not grant certiorari due to a pending civil action in the United States District Court for the district of Utah. That action is of little comfort to the petitioner who has been sentenced to a term of 0-5 years in the Utah State Penitentiary. He is not a party to the federal litigation nor a member of the Ute Indian Tribe. His petition was filed in this court in forma pauperis. His counsel is appointed. It is not likely he will be entitled to have counsel appointed for him in the civil case pending in the Federal District Court.

The result of the Ute Indian Tribe's efforts to prevent the state from enforcing the Perank decision may

or may not affect petitioner. The remedies available to petitioner in this court should not be denied him because of the litigation instigated by the Ute Indian Tribe. The action which was filed by the Ute Indian Tribe in the district court only underscores the need for this court to grant certiorari and determine the boundaries of the Uintah and Ouray Indian Reservation.

3. In its brief, the Ute Indian Tribe erroneously states in paragraph 8 that the petitioner suggested that the tribe had a full and fair opportunity to litigate the reservation boundary issue in the state court proceedings. Rather the petitioner stated that both the Ute Indian Tribe and the State of Utah had a full and fair opportunity to litigate the issue which was adjudicated on the merits by the Tenth Circuit.

The Ute Indian Tribe also states "After hearing oral argument in Perank's appeal, the Utah Supreme Court invited the Ute Indian Tribe to file an amicus brief in the Perank case. The tribe filed its brief on July 19, 1988 and the case was argued before the Utah Supreme Court on October 8, 1988. Furthermore, the Supreme Court of the State of Utah had the benefit of the entire record considered by the Tenth Circuit including copies of all briefs submitted by the parties which were filed with the Tenth Circuit. (Appendix A).

4. The Ute Indian Tribe on page 3 of its brief states that a federal action against petitioner was dismissed for lack of jurisdiction after the court

determined that petitioner was not an Indian for criminal jurisidiction purposes. The tribe further states that petitioner argued in federal court that he was non-Indian. The tribe argues that petitioner later argued in state court that the state had no jurisdiction against him because he was an Indian. No criminal charges were filed against petitioner in federal court and there was no court determination that he was not an Indian for purposes of criminal jurisdiction. The state mistakenly thought charges had been filed against petitioner in federal court. Petitioner did not claim to be non-Indian in federal court rather has maintained throughout these proceedings that he is an Indian.

5. The Ute Indian Tribe states in its brief that petitioner is non-Indian. The primary argument of the Ute Indian Tribe is that petitioner is not an Indian for criminal jurisdiction purposes since he is not a member of a federally recognized Indian tribe. Petitioner is a member of the Little Shell Tribe of Chippewa Indians, a non federally recognized tribe of Indians. A person may still be an Indian for purposes of criminal jurisdiction although not enrolled with a recognized tribe. St. Cloud v. U.S. , 702 F. Supp. 1756 (D.S.D. 1988) citing United States v. Broncheau , 597 F. 2d 1260 (9th Cir. 1979), cert.denied , 444 U.S. 859. Enrollment in a tribe is only one of the factors in determining whether a person is recognized as an Indian. St. Cloud , supra.

Counsel for the Ute Indian Tribe argues that

petitioner is non-Indian, however on August 11, 1992 petitioner was sentenced for a simple assault in the Ute Indian Tribal Court. (Appendix B). Tribal Courts have no criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe , 435 U.S. 191 (1978).

CONCLUSION

Based on the petition for Writ of Certiorari filed by Mr. Hagen, the briefs filed by the State of Utah, the Utah Counties of Duchesne and Uintah and the States of California, North Dakota, South Dakota and Washington, the petitioner urges that his petition for a Writ of Certiorari be granted.

DATED this 30 day of November, 1992.

Joel D. Berrett
Attorney for Petitioner

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Attorney for Plaintiff
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Duchesne, Utah 84021
(801) 738-2624

THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH
IN AND FOR DUCHESNE COUNTY

STATE OF UTAH, Plaintiff/Respondent, vs. CLINTON PERANK, Defendant/Appellant.	STIPULATION Criminal No. 1121

COME NOW the parties, by and through their respective counsel pursuant to the Order of the District Court, and stipulate as follows:

1. That the record to be considered in this appeal shall be photo copies of that portion of the Federal District Court record which was designated as the record on appeal in the case of Ute Indian Tribe vs. State of Utah, et al, case numbers 81-1827 and 81-1909.

2 That in addition to the designated record on appeal, the parties shall provide for the convenience and consideration of the Court, copies of all briefs submitted throughout the ap- pellate process of the above-entitled cases.

DATED this 5 day of March, 1987.

Attorney for:
Plaintiff/Respondent

Attorney for:
Defendant/Appellant

APPENDIX A

ase no. CR 101-92.
itation no _____

Ute Indian Tribal COURT DOCKET

THE UTE INDIAN TRIBE,

-vs-

Defendant Robert P Hagen

olation date MAY 10, 1992 Complaining witness LISA FRISBY

HARGES

1 SIMPLE ASSAULT 2 _____

ction no 13-11-4 Section no _____

ARRANT ISSUED _____ 19__ Warrant no _____

MMONS ISSUED _____ 19__ Returned endorsed _____ 19__

OTES 5-11-92 FILED:

EA(S) 5-12-92

1 Not Guilty class B 2 _____

Clerk of the Court

DER AND COMMITMENT

On this 11th day of August, 19 92, the above named defendant has been found GUILTY of the violation(s). It is therefore ordered that:

$100.00 fine & 25.00 Court Cost.

45 days in jail, Suspended.

(XX) Granted 30 days time to pay, until September 11, 19 92.

BY THE ORDER OF:

Judge of the Ute Tribal Court

ount of fine: $100.00 Court cost: $25.00

DATE	RECEIPT #	AMOUNT	BALANCE

SE CLOSED ON _____ 19__

ERK _____

BAIL CASH ( ) _____ Receipt # _____

PROPERTY ( ) Description _____

PERSONAL RECOGNIZANCE ( ) _____

BOND _____ on _____ 19__

BOND _____ on _____ 19__

BOND _____ on _____ 19__

APPENDIX B